Kohler Mix Specialties, Inc. *and* Milk Drivers and Dairy Employees Local 471, affiliated with the International Brotherhood of Teamsters, AFL–CIO. Case 18–CA–13040

September 29, 2000

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

Upon a charge filed by the Milk Drivers and Dairy Employees Local 471 (the Union), the General Counsel of the National Labor Relations Board issued a complaint against Kohler Mix Specialties, the Respondent, alleging that it had violated Section 8(a)(5) and (1) of the Act. Subsequently, the Respondent filed an answer admitting in part and denying in part the complaint allegations and requesting that the complaint be dismissed.

On January 22, 1998, the Respondent filed with the Board a Motion for Summary Judgment, arguing that the Board should defer to an arbitrator's decision in this case and dismiss the complaint. On January 29, 1998, the Board issued an order transferring proceedings to the Board and Notice to Show Cause why the motion should not be granted. The General Counsel filed an opposition and brief in opposition to the Respondent's motion. The Respondent thereafter filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, the Board issues the following

Ruling on Motion for Summary Judgment

The facts drawn from undisputed statements in the pleadings and briefs are as follows: The Respondent, a manufacturer of ice cream and ice cream mixes, has recognized the Union as the exclusive collective-bargaining representative of its production and delivery employees since approximately 1950. On November 17, 1993, the Respondent notified the Union that it intended to discontinue its over-the-road delivery operations on December 3, 1993, and to subcontract that portion of its business. The Union thereafter filed a grievance and, on March 14, 1994, filed an unfair labor practice charge alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain over the decision, and the effects of the decision, to discontinue its over-the-road operations and to terminate its over-the-road drivers.

On April 20, 1994, the Regional Director administratively deferred proceeding on the charge pending resolution of voluntary grievance arbitration, in accord with *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). A hearing was held before Arbitrator Herbert Fishgold on August 20 and 21 and December 21, 1996. The Union contended before the arbitrator that the Respondent had violated several provisions of the parties' collective-bargaining agreement that allegedly limited the Respondent's right to subcontract bargaining unit work. It also contended that the Respondent failed to give notice of rights and obligations existing under the contract and under the Act. The Respondent countered that the arbitrator's authority was limited to interpreting the terms of the collective-bargaining agreement, and he was therefore not authorized to consider the merits of the unfair labor practice charge. The Respondent argued further that its actions did not violate any provision of the agreement and that the grievance must therefore be denied.

In an award dated April 14, 1997, the arbitrator specifically declined to resolve any disputes arising under the Act. He found that these matters must be left to the Board and that his authority was limited to interpreting the terms of the collective-bargaining agreement. In doing so, the arbitrator found that the parties' collective-bargaining agreement did not prohibit the Respondent from subcontracting its over-the-road delivery operations. He further found that the Respondent subcontracted for legitimate business reasons, did not seek to avoid contractual obligations, and did not act out of any union animus. Finally, the arbitrator found that the contract did not impose any obligation on the Respondent to bargain over its decision to subcontract or to bargain over the effects of its decision. As a factual matter, however, the arbitrator noted that the Respondent showed a willingness to engage in effects bargaining at a meeting with the Union on December 1, 1993, and further, that the Respondent did engage in at least some aspects of effects bargaining after it discontinued its over-the-road operations.

In *Olin Corp.,* 268 NLRB 573, 574 (1984), the Board set forth the standards under which it would defer to an arbitrator's award consistent with the post arbitral deferral doctrine of *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955). The Board held that it would defer where the proceedings are fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the Act, and the arbitrator has adequately considered the unfair labor practice issue. The Board stated in *Olin* that it would find that an arbitrator has adequately considered the unfair labor practice issue if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. Having duly considered the matter, we find that deferral is not appropriate here because the arbitrator did not adequately consider the unfair labor practice issue.

The issue before the Board is whether the Respondent, by failing and refusing to bargain with the Union about its decision, and the effects of its decision, violated its statutory obligation to bargain set forth in Section 8(d) and enforceable through Section 8(a)(5). Resolution of this issue requires a determination of whether the decision is a mandatory subject of bargaining, whether the Union has waived a statutory right to bargain about the decision or its effects, and whether the Respondent has already satisfied its obligation, if any, to bargain. The issue decided by the arbitrator, however, was only whether any provision of the parties' contract affirmatively *prohibited* the Respondent's unilateral decision to subcontract its over-the-road-delivery operation. Finding no such prohibition, the arbitrator concluded that there had been no breach of contract.

In these circumstances, we agree with the General Counsel that *Armour & Co.*, 280 NLRB 824 fn. 2 (1986), is dispositive of the deferral issue. As in this case, the arbitrator in *Armour* found that the parties' contract did not prohibit a challenged unilateral change by the employer, but the arbitrator did not consider whether the respondent had fulfilled, or the union had agreed to waive, any statutory duty to bargain. In declining to defer, the Board noted that the absence of a "contractual prohibition" of the employer's action was "neither conclusive of the statutory issue . . . nor inconsistent with a finding that the Respondent had breached its statutory duty to bargain." Id. See also *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 fn. 5 (1990).

Further, we find distinguishable such cases as *Southern California Edison Co.*, 310 NLRB 1229 (1993), relied on by the Respondent. In that case, the arbitrator found that certain contractual provisions affirmatively *permitted*, i.e., specifically afforded management the discretion to implement, the unilateral change at issue. No party contended that the arbitrator had not adequately considered the unfair labor practice issue, and the only issue before the Board was whether the arbitrator's decision was "clearly repugnant." See also *Dennison National Co*., 296 NLRB 169, 170 fn. 6 (1989), where the Board distinguished *Armour & Co*. and found that the arbitrator had adequately considered the unfair labor practice issue inasmuch as he did not limit himself to the issue of whether the respondent's unilateral action violated the collective-bargaining agreement, but also found that the management-rights clause of the contract granted the respondent the right to act unilaterally.

This cited precedent makes clear that an arbitral determination that a contract does not prohibit an employer action is not tantamount to a finding that the parties have contractually agreed to permit that action. As the Board noted in *Dennison*, supra at 170 fn. 6, "an employer can violate its statutory obligation to bargain without also violating its collective-bargaining agreement."

Our dissenting colleague does not expressly quarrel with this precedent, but argues that, here, certain factual findings by the arbitrator effectively resolved the statutory issue by implicitly finding that the Respondent's decision was not a mandatory subject of bargaining. We disagree.

Although the Board may conclude that an arbitrator has effectively resolved an unfair labor practice issue even when the arbitrator has expressly declined to address that issue,[1] this case does not present circumstances in which the arbitrator may fairly be found to have done so. The factual findings referred to in the dissent were made by the arbitrator in addressing the Union's contention that a combination of contractual provisions implicitly prohibited the Respondent's subcontracting action. In addressing this contention, the arbitrator followed "the general arbitration rule . . . that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in a subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it." Arb. Dec. at 11. He found that the Respondent based its decision to subcontract solely on legitimate business reasons because the over-the-road driver operations "did not fit in with the Company's strategic goals, the personalized service of the OTR drivers was no longer necessary and the legal risks, and associated costs were too high to continue the OTR operations." Id. at 12.

In his analysis, the arbitrator did not have to find, nor did he implicitly find, that the Respondent's decision did not involve labor costs, direct or indirect, or any other matter that was amenable to the bargaining process. See generally *Overnite Transportation*, 330 NLRB No. 184 (2000); and *Eby-Brown Co*., 328 NLRB 514 (1999). In fact, the testimony of the Respondents' witnesses clearly shows that the "associated costs" mentioned by the arbitrator included the labor cost of workmen's compensation claims.[2] The Board has held that workmen's compensation programs are mandatory subjects of bargaining.[3] Furthermore, this same testimony manifests a concern for

[1] See *Dennison*, supra at 170, and cases cited there in fn. 4.

[2] The excerpted transcript submitted by the Respondent in support of its Motion for Summary Judgment does not show that it would have been less expensive in terms of labor costs for the Respondent to continue its over-the-road operations instead of subcontracting them. The arbitration record shows that the Respondent conducted a survey indicating that in April 1993, several months before the subcontracting decision was made, the *overall costs* of a subcontracting operation would have been more expensive than the overall costs of continuing the existing over-the-road program.

[3] *Jones Dairy Farm*, 295 NLRB 113 (1989).

employee safety, which is undisputedly a subject for mandatory bargaining.[4]

On the basis of the evidence presented in support of the Respondent's motion, therefore, this case is distinguishable from *Oklahoma Fixture Co.*, 314 NLRB 958 (1994), cited by the dissent. In that case, the *sole reason* for the respondent employer's subcontracting decision was the need to immunize it from legal liability to customers and third parties. Thus, the Board found that:

> This case presents the unusual situation . . . because the credited testimony establishes that the decision to subcontract was based on core entrepreneurial concerns outside the scope of mandatory bargaining. . . . "Labor costs," even in the broad sense of the term employed by the Board, were not a factor in the decision. Accepting as we do the credited reasons for the Respondent's decision, we find that it involved considerations of corporate strategy fundamental to preservation of the enterprise. [Id. at 960.]

Here, in contrast, contrary to our dissenting colleague we cannot conclude based on the available arbitration record that the arbitrator's findings are tantamount to a finding that this is also an "unusual situation" where labor costs were not a factor in the Respondent's decision or that the decision was not amenable to collective bargaining.[5]

Accordingly, we deny the Respondent's Motion for Summary Judgment.

ORDER

The Respondent's Motion for Summary Judgment is denied, and the proceeding is remanded to the Regional Director for Region 18 for further appropriate action.

MEMBER HURTGEN, dissenting.

For the reasons set forth below, I conclude that it is appropriate to defer to the arbitrator's award in accordance with *Olin Corp.*[1] and *Spielberg Mfg. Co.*[2] Accordingly, contrary to my colleagues, I would grant the Respondent's Motion for Summary Judgment and dismiss the complaint.

It is well settled that the Board will defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act,[3] and the arbitrator has considered the unfair labor practice issue presented to the Board. *Raytheon Co.*, 140 NLRB 883, 884–885 (1963). The Board finds that the last requirement is met where (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, supra at 574. With respect to the "repugnancy" standard, the Board has stated: "Differences, if any, between the contractual and statutory standards of review are weighed by the Board as part of its determination under *Spielberg* standards of whether an award is clearly repugnant to the Act." *Dennison National Co.*, 296 NLRB 169, 170 (1989). Further, it is well established that the Board places the burden on the party opposing deferral to show that these standards have not been met.

In the instant case, I find that the General Counsel has failed to meet his burden. In this regard, I note that there is no claim, nor do my colleagues assert, that the arbitral proceedings were unfair or irregular or that any party did not agree to be bound by the arbitrator's award. Nor has the General Counsel established that the arbitrator's decision was clearly repugnant to the purposes and policies of the Act. Rather, my colleagues point to certain distinctions between the issue before the arbitrator and the issue before the Board.

I agree that the contractual issue before the arbitrator is somewhat different from the statutory issue before the Board. In the former, the issue is whether the employer's action was permitted or prohibited by the contract. In the latter, the issue is whether the employer's refusal to bargain was privileged. However, another issue under the statute is whether the employer's conduct involved a mandatory subject of bargaining. I show below that the facts of this case, as found by the arbitrator, do not support the General Counsel's allegation that Respondent's conduct involved a mandatory subject of bargaining.[4]

[4] E.g., *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976).

[5] With respect to whether the Respondent met its obligation to bargain over the effects of the decision to subcontract, we find that the arbitrator also did not adequately consider that issue. Although he did note certain evidence on the issue, he made no dispositive findings on the issue in light of his conclusion that the contract imposed no effects bargaining obligation. Under these circumstances, we do not need to pass on whether a dispositive arbitral finding that the Respondent had made an effective bargaining offer would be repugnant to the Act. We likewise do not address our dissenting colleague's view, based in part on his own prior dissenting opinions, that it would not be repugnant to the Act to find that the management decision at issue here was not a mandatory subject of bargaining under the Act. The statutory issues remain to be resolved in an unfair labor practice hearing before an administrative law judge.

[1] 268 NLRB 573 (1984).

[2] 112 NLRB 1080 (1955).

[3] *Spielberg Mfg.*, supra at 1082.

[4] To the extent that my colleagues cite case support for the proposition that deferral is inappropriate because the statutory "waiver" issue was not effectively resolved by the arbitrator, I find that proposition to be inapplicable. Cf. *Armour & Co.*, 280 NLRB 824 (1986). Thus, the basis for my deferral is not that the arbitrator effectively found that the Union had contractually waived any statutory right it had to bargain over a mandatory subject, but rather that the decision itself was not a mandatory subject of bargaining. Similarly, my colleagues say that

This case involves the Respondent's decision to discontinue its over-the-road delivery operations, sell the trucks and trailers that it used in those operations, and subcontract that work.

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981), the Supreme Court set forth the following test for determining whether certain management decisions are mandatory subjects:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Under this balancing test, bargaining is required only where the potential benefits of collective bargaining outweigh the burdens such bargaining would place on the Respondent's conduct of its business. Here, I find that the arbitrator made express factual findings which establish that the potential benefits of bargaining would not outweigh the burdens of bargaining. In this regard, the arbitrator found that:

> [T]he Employer has shown that the subcontracting in this case was done for legitimate business reasons. The evidence in the record overwhelming supports the Employer's assertions that it terminated the [over-the-road] operations because the operations did not fit in with the Company's strategic goals, the personalized service of the [over-the-road] drivers was no longer necessary and the legal risks, and associated costs were too high to continue the [over-the-road] operations. The evidence does not support a conclusion that the discontinuance of the operations was done to avoid the Employer's contractual responsibilities or that the decision was based on any anti-union animus.

I recognize that these findings were not made in the context of ascertaining whether the Respondent's actions were in the area of mandatory bargaining. However, as my colleagues recognize, it makes no difference that the arbitrator was not addressing a statutory issue. The essential point is that the arbitrator made fact-findings that are relevant to the statutory issue. In this case, the arbitrator made fact-findings that are relevant to the statutory issue of whether Respondent acted with respect to a mandatory subject. In this regard, I find this case analogous to *Oklahoma Fixture*, 314 NLRB 958 (1994). In that case, the Board held that an employer was not obligated to bargain over its decision to subcontract electrical work because the decision was based on core entrepreneurial concerns. Thus, in *Oklahoma Fixture* the Board found no bargaining obligation because the decision did not turn on labor costs but was undertaken because of concerns over the Respondent's legal liability and potential for customer loss in the event of defective wiring. So too, here, the Respondent's decision to get out of the business of over-the-road transport of its product was because this transport did not fit in its strategic goals, and the legal risks and associated costs were too high to continue this operation. The decision was not based on labor costs.[6]

My colleagues say that "legal risks" and "associated costs" (terms used by the arbitrator) are references to labor costs. I disagree. In context, I think it far from clear that these ambiguous phrases refer to labor costs. And, it is the General Counsel who has the burden of proof in this respect. In any event, even if this is the reference, that does not mean that the decision was a mandatory subject. More particularly, the test is not whether labor costs played *any* role in the decision, but whether the decision *turned on* labor costs. Clearly, it did not. Indeed, the Respondent made its decision knowing that to do so would raise rather than lower its operating costs. Further, although workers compensation was one of the elements on which the Respondent relied, this was only a part of the larger matter of legal liabilities and costs attendant to an over-the-road operation which the Respondent no longer wanted to bear. Thus, with the increase in its transport operations came an increase in accidents, damage to equipment and product, and driver injury, as well as the concern that an accident would result in a significant liability to others. The Respondent concluded that it did not want to run that level of risk or take on that type of liability. This is precisely a type of "legal liability" which, in *Oklahoma Fixture*, the Board found did not impose a bargaining obligation on an employer.

Finally, although my colleagues correctly note that workers compensation is a mandatory subject of bargaining, they overstate the implications of that fact when inferring that the "labor costs of workmen's compensations claims" were significant enough to require bargaining over the Respondent's decision. In this regard, the actual contribution levels, benefits and coverage are set by state law. While there are ancillary issues over which parties must

deferral would be unwarranted if the arbitrator dealt with the issue of contractual prohibition rather than the issue of statutory permission. In view of my conclusion as to nonmandatory subject, I do not resolve this issue.

[6] Indeed, uncontradicted evidence at the arbitration hearing established that it would have been substantially less expensive, in terms of labor costs, for the Respondent to continue its over-the-road operations instead of contracting them out.

bargain—such as supplemental workers compensation coverage or employer requirements that employees receiving compensation work light-duty jobs—the core liabilities and costs are set by state law and are not "labor costs" over which the parties must bargain.

In sum, workers compensation was, at most, only a part of the phrases "legal risks" and "associated costs," and these phrases themselves are only a part of the factors that motivated Respondent's decision.

Accordingly, as the arbitrator's factual findings establish that the Respondent's decision was based on reasons other than labor costs, and as I defer to those findings, I conclude that the decision was not a mandatory subject.

Finally, contrary to my colleagues, I conclude that the arbitrator's factual findings also resolve the statutory issue of whether the Respondent violated Section 8(a)(5) by failing to engage in effects bargaining. Thus, the arbitrator found, as a factual matter, that the Respondent was willing to engage in such discussions, yet the Union chose not to respond.

Specifically, the arbitrator held that:

> [R]egardless of any contractual responsibility, the Employer did show a willingness to engage in such discussions at a time when the discussions could have been fruitful. At the December meeting, [Vice President of Operations] Bob Banken asked, "What else do we have to do?" The Union chose not to respond, based on their decision that the meeting was not a negotiating session. That decision was made by the Union. There is no indication that the Company would have refused to negotiate effects. To the contrary, Banken's raising the question at the December 1 meeting indicated an apparent willingness to discuss the matter. Moreover, at a later point the Company and the Union did engage in at least some aspects of effects bargaining when they met with the Federal mediator. There is no reason to believe that these discussions could not have been held earlier, either at the December 1 meeting or shortly thereafter, but for the Union's reluctance to discuss the matter.

Therefore, the arbitrator also made factual findings, which resolve the effects bargaining allegation.

Accordingly, based on the foregoing factual findings by the arbitrator, which resolve the statutory 8(a)(5) allegations, I would grant the Respondent's motion and dismiss the complaint.